Supreme Court, U.S.
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No. 06-911 DEC 08 2006

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL J. BARNES, JR.,
Petitioner
v.

KIM KRISTINE JEUDEVINE,
Respondent

On Petition For Writ Of Certiorari
To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Have Petitioner's Constitutional Rights been violated by the Michigan Supreme Court decision that he lacks standing to pursue paternity of a child, and may not have even an evidentiary hearing on the matter where: Respondent mother, while pregnant with Petitioner's child, was divorced from her husband by entry of a Default Judgment of Divorce that stated, "no children were born of this marriage and none are expected;" on the day after the child's birth, Petitioner and Respondent signed an Affidavit of Parentage and Birth Certificate naming Petitioner the father of the child; Petitioner, Respondent, and their child then cohabited as a family for over four years; and, Respondent does not dispute that Petitioner is the biological father of the child?

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2. Opinion of Michigan Supreme Court entered July 26, 2006, reversing the Michigan Court of Appeals, ***Barnes v Jeudevine*, 475 Mich 696; 718 NW2d 311 (2006).**

3. Court of Appeals Opinion entered August 23, 2005, reversing the Michigan 9th Circuit Court, ***Barnes v Jeudevine*, Unpublished, Westlaw citation WL 2017182 (Mich. App.).**
4. Michigan Ninth Circuit Court opinion entered December 1, 2003, dismissing the Complaint for Paternity based on lack of standing. ***Barnes v Jeudevine*, Unpublished.**

CONCISE STATEMENT OF BASIS FOR JURISDICTION

The Michigan Supreme Court entered an Order September 14, 2006 denying Petitioner's Motion for Reconsideration, Rehearing, and Other Relief. The motion was filed in response to the Michigan Supreme Court's Opinion that had been entered July 26, 2006. The Motion denied by the Michigan Supreme Court on September 14, 2006 specifically raised Federal questions; three of the seven Justices of the Michigan Supreme Court would have granted the Motion.

This Petition is filed under the United States Supreme Court Rule 10.

This Court has jurisdiction in this matter based on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE.

The text of these items are included within the attached appendix.

1. Amendment V of United States Constitution.
2. Amendment XIV of United States Constitution.
3. 28 U.S.C. § 1257.
4. Michigan Paternity Act, MCL § 722.711(a).

CONCISE STATEMENT OF THE CASE SETTING OUT FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED, AND WHEN THE FEDERAL QUESTIONS WERE RAISED, METHOD AND MANNER OF RAISING THEM, AND THE WAY IN WHICH THEY WERE PASSED ON BY THOSE COURTS

In the spring of 1998 Respondent Kim Kristine Jeudevine, f.k.a. Kim Kristine Charles was married to James Vincent Charles, III; they had wed July 11, 1996. Respondent and Mr. Charles separated in May of 1998. Petitioner and Respondent began to cohabit immediately thereafter in May of 1998. Mr. Charles filed a Complaint for Divorce, *In Pro Per*, July 9, 1998, in 9th Circuit Court-Family Division, Case Number D98-1928-DO. The Complaint for Divorce alleged that there were no minor children born during the marriage and the wife was not pregnant.

The Complaint for Divorce was personally served on Respondent August 12, 1998.

On October 1, 1998 an Affidavit, Non-Military Affidavit, and Default was entered in the divorce. Plaintiff Charles swore in the Affidavit that Respondent Mrs. Charles had not filed or served an Answer to the Complaint for Divorce or taken other action.

On October 8, 1998, Plaintiff Charles served Respondent Mrs. Charles with a Notice of Request for Judgment which indicated that the Request would be considered at a hearing November 2, 1998 in the 9th Circuit Court-Family Division.

On October 29, 1998 Plaintiff Charles filed a Proof of Service which indicated he had served Respondent with the Notice of Request of Judgment on October 8, 1998, and the Affidavit, Non-Military Affidavit and Default on October 14, 1998 via first class mail.

On November 2, 1998 the 9th Circuit Court-Family Division entered a Judgment of Divorce. Plaintiff Charles appeared *In Pro Per* and offered proofs; he testified, "There were no children born of this marriage, my wife is not pregnant at this time to the best of

my knowledge." Respondent Mrs. Charles did not appear. The Judgment of Divorce provided, "it further appearing that no children were born of this marriage and none are expected." (See Judgment of Divorce attached in the Appendix, page 46).

On February 26, 1999 Respondent Jeudevine gave birth to the child at the heart of this matter, McClain Michael Barnes. On February 27, 1999 a Birth Certificate was prepared which identifies Petitioner Michael J. Barnes, Jr. and Respondent Kim Kristine Jeudevine as the parents of McClain Michael Barnes. On that same date the parties both signed an Affidavit of Parentage which likewise identifies Petitioner Michael J. Barnes, Jr. and Respondent Kim Kristine Jeudevine as the parents of McClain Michael Barnes. (See Affidavit of Parentage attached in the Appendix, page 50).

The Affidavit of Parentage contains the statement that:

> Further, the mother states that she was not married when this child was born or conceived; or, that this child, though born or conceived during a marriage, is not an issue of that marriage as determined by a court of law.

The parties and their child continued to cohabit until the summer of 2003. Neither Petitioner nor Respondent ever sought an order regarding custody, parenting time, or support during the time of cohabitation.

Following the parties' separation in the summer of 2003, Petitioner filed a Complaint for Custody, *In Pro Per*. Respondent responded with a Motion for Summary Disposition pursuant to MCR 2.116(b), (c), and (d). The Motion was granted and the case was dismissed.

Petitioner then filed a Motion to Intervene, Motion for Relief from Judgment, and Motion for *Serafin* Hearing in what was the Charles divorce. That motion too was dismissed.

Finally, Petitioner filed a Complaint for Paternity. Respondent again filed a Motion for Summary Disposition. Respondent argued that since the child was conceived while Respondent was married, the child is not a "child born out of

wedlock," as defined in the Paternity Act, MCL 722.711(a). Therefore, Respondent argued, Petitioner does not have standing to bring a paternity action.

Petitioner argued that since the 9th Circuit Court Family Division entered the Charles' Judgment of Divorce which stated that "no children were born of this marriage and none are expected," that was a determination that McClain Michael Barnes was not "an issue of the marriage." Further, since courts speak through their orders and judgments, the Judgment of Divorce was a determination by the court.

Therefore, Petitioner argued, McClain Michael Barnes is a "child born out of wedlock," as defined in the second prong of the Paternity Act definition.

The trial court reasoned that a Default Judgment of Divorce was not what the Legislature or the Supreme Court had in mind when it was written "that the court has determined." The trial court considers a Default Judgment of Divorce allegations put forward by Plaintiff that are not refuted by Defendant, but are not necessarily true.

The trial court then granted the Motion for Summary Disposition and the case was dismissed.

The Michigan Court of Appeals in a unanimous decision reversed the 9th Circuit Court dismissal of Petitioner's Complaint for Paternity. Respondent filed in the Michigan Supreme Court an Application for Leave to Appeal. The Michigan Supreme Court reversed the Court of Appeals. Petitioner filed a Motion for Reconsideration, Rehearing, and Other Relief. Among other things, Petitioner argued the majority opinion violated his Constitutional Rights of Equal Protection, Procedural Due Process, and Substantive Due Process.

It was within that Motion for Reconsideration, Rehearing, and Other Relief that federal questions were first raised. The Circuit Court had dismissed the case without referring to any federal issues. The Michigan Court of Appeals reversed without any consideration of federal issues. And, at the Michigan Supreme Court, federal issues were not referenced by either party in the

briefs or oral arguments, the majority opinion, or the two dissenting opinions.

Three of the seven Michigan Supreme Court Justices would have granted Petitioner's Motion for Reconsideration, Rehearing, and Other Relief. The same four justices who signed the majority opinion voted to deny the motion. That denial gave rise to this Petition.

DIRECT, CONCISE STATEMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

In *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), an unwed father whose children, upon the mother's death, were declared state wards and placed in guardianship attacked the scheme as violative of equal protection. Although the State of Illinois refused to consider him a, "legal parent," it was undisputed that he was the father. 405 U.S. 645, *Footnote 4, 650.* The Court stated that,

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."
>
> The Court has frequently emphasized he importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "[r]ights far more precious ... than property rights." "It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.

> Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. *"To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses."* 405 U.S. 651-652. (Citations omitted, emphasis added).

In *Lehr v Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), a putative father sought to vacate an adoption of the child on the ground that it was obtained in violation of his Due Process and Equal Protection Rights of the Fourteenth Amendment. This Court considered the difference between a man who had established a relationship with the child, as in *Stanley*, as compared to the father in *Lehr* who had no such relationship. This Court stated,

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection. The acts of judges neither create nor sever genetic bonds.

> "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of the blood relationship.
>
> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. Citations omitted. 463 U.S. 261-262.

In *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), this court considered a paternity situation with extremely unusual facts. The putative natural father, whose blood tests indicated 98.07% probability of paternity and who had established a parental relationship with the child, filed a filiation action to establish paternity and right to visitation. The California Superior Court granted summary judgment to the husband, who was presumed to be the father under California law because he was living with the mother at the time of the child's birth, and who desired to raise the child with the mother as his own in their intact marriage. This Court refused to invalidate the state statute because the mother was at the time of the legal proceedings, as well as at the conception and birth of the child married to and cohabiting with another man, both of whom wished to raise the child as the offspring of their marriage.

Michael H. is easily distinguished from the case at bar because of the marital status of the mother. Here Respondent mother was divorced before the birth of the child with entry of a Judgment of Divorce that stated, "no children were born of this

marriage and none are expected;" her ex-husband is married to another woman now.

Consideration of just the three cases *supra* compels a conclusion that this court should consider the state action against Petitioner. Similarly to *Stanley*, Petitioner had established a parental relationship with his son when he cohabited with Respondent and their son, McClain Michael Barnes, for the first four years of McClain's life. And as in *Stanley*, it is undisputed by Respondent that Petitioner is the biological father of McClain.

Obviously, *Lehr* is distinguished from the case at bar for the same reasons that *Stanley* is analogous; the relationship between Petitioner and McClain. However, the legal doctrines in *Lehr* should be considered.

Finally, as just mentioned, *Michael H.* is similar in many respects, except for the one factor on which this Court rested its decision: the marital status of the mother.

Pursuant to Supreme Court of the United States Rule 29(4)(c), it should be noted that the constitutionality of a statute of the State of Michigan is drawn into question and neither the State of Michigan, nor any agency, officer, or employee of the State of Michigan is a party, and yet, 28 U.S.C. 2403(b) may apply.

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Michigan Supreme Court
Lansing, Michigan

Chief Justice:
Clifford W. Taylor

Justices:
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephan J. Markman

Order

Rehearing No. 532
No. 129606

MICHAEL J. BARNES, JR.,
Plaintiff-Appellee,

SC: 129606
CoA: 252840
Kalamazoo CC: 03-6657-DP

v

KIM KRISTINE JEUDEVINE,
Defendant-Appellant.

In this cause, a motion for rehearing is considered and it is DENIED.

Cavanagh, Kelly and Markman, J.J., would grant rehearing.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 14, 2006 s/_____
Clerk

Michigan Supreme Court
Lansing, Michigan

Chief Justice:
Clifford W. Taylor

Justices:
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephan J. Markman

Opinion

FILED JULY 26, 2006

MICHAEL J. BARNES, JR.,
Plaintiff-Appellee,

v No. 129606

KIM KRISTINE JEUDEVINE
Defendant-Appellant.

BEFORE THE ENTIRE BENCH
WEAVER, J.

Plaintiff filed this action seeking a determination of paternity for a child conceived while the child's mother was married to another man. Plaintiff alleges that the child was not an issue of the marriage, because he is the child's biological father. The question presented is whether plaintiff has standing under the Paternity Act, MCL 722.711 et seq., to seek a determination of paternity. To resolve this question in this case, we must decide whether a default judgment of divorce that states it appears that "no children were born of this marriage and none are expected" is a sufficient judicial determination that the subject child was not an issue of the marriage.

We reverse the judgment of the Court of Appeals and hold that plaintiff does not have standing under the Paternity Act because the default judgment is not clear and convincing evidence that the child was not an issue of the marriage. We remand this

case to the circuit court for the entry of an order of summary disposition for the defendant.

I

Defendant-appellant Kim K. Jeudevine married James V. Charles III on July 11, 1996. Sometime before Charles filed for divorce and before defendant was served with the divorce complaint on August 12, 1998, defendant learned that she was pregnant. Defendant did not inform her husband that she was pregnant. Plaintiff Michael J. Barnes, Jr., alleges that he is the child's biological father.

Defendant did not respond to the complaint for divorce and did not appear at the divorce hearing. A default judgment was entered on November 2, 1998. The default judgment provides:

> [I]t satisfactorily appears to this Court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed, and there remains no reasonable likelihood that the marriage can be preserved; it further appearing that no children were born of this marriage and none are expected.

On February 26, 1999, four months after the divorce was final, defendant gave birth. A birth certificate identifies plaintiff as the child's father and an affidavit of parentage signed by plaintiff and defendant the day after the child's birth states that plaintiff is the father.[1] Plaintiff and defendant lived together and raised the child for over four years, until the summer of 2003, when plaintiff and defendant ended their relationship. Defendant has not allowed plaintiff to see the child since they stopped living together.

On September 30, 2003, plaintiff filed a paternity action against defendant, alleging that he was the father of defendant's

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[1] The affidavit of parentage states that by signing the document, the mother of the child admits that "she was not married when this child was born or conceived; or that this child, though born or conceived during a marriage, is not an issue of that marriage as determined by a court of law."

child. To support his contention, plaintiff cites the judgment of divorce between Charles and defendant that states "that no children were born of this marriage and none are expected." Plaintiff also cited the affidavit of parentage and the birth certificate identifying plaintiff as the father of the child.

Defendant answered plaintiff's paternity action on October 22, 2003. She neither admitted no denied plaintiff's claimed paternity. However, defendant denied that the child was born "out of wedlock," because the child had been conceived while she was legally married to Charles. Defendant admitted signing the affidavit of parentage and the birth certificate, but claimed that she did so under duress.

On November 10, 2003, a hearing was held in the Family Division of the Kalamazoo Circuit Court. The court granted defendant's motion for summary disposition, concluding that plaintiff did not have standing to sue under the Paternity Act. The court found (1) that the child was conceived during the marriage and (2) that there was no court determination that the child was a child born or conceived during the marriage but is not the issue of that marriage.

Plaintiff appealed, and the Court of Appeals reversed the order of the circuit court and remanded the matter to the circuit court for the reinstatement of plaintiff's claim.[2] The Court of Appeals held that the statement in the default judgment of divorce that "no children were born of this marriage and none are expected" was a determination by a court that the child was not an issue of the marriage. Therefore, the Court of Appeals held that plaintiff had standing to sue under the Paternity Act.

Defendant sought leave to appeal in this Court, and we ordered the clerk to schedule oral argument pursuant to MCR 7.302(G)(1) to determine whether to grand defendant's application.[3] We asked the parties to include among the issues to be addressed:

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[2] Unpublished opinion per curiam, issued August 23, 2005 (Docket No. 252840.)

[3] 474 Mich 1056 (2006).

(1) [W]hether plaintiff lacked standing to proceed under the Paternity Act, MCL 722.711 et seq., where the subject child's mother was married at the time of the child's conception, see *Girard v Wagenmaker*, 437 Mich 231 (1991); and (2) whether the default judgment of divorce amounted to a judicial determination that the child was born or conceived during the marriage, but was not the issue of the marriage.

II

The Paternity Act, MCL 722.711 et seq., confers on the circuit court jurisdiction over proceedings involving the determination of a child's paternity. One purpose of the act relevant to this case is to assure, for the sake of the child, that the child's legitimacy will not be decided by mere casual inference, but only after specific statutory procedures are followed. To this end, the act provides that a mother, a father, or in certain circumstances, the Department of Human Services, may bring an action in circuit court to establish paternity of a child, if that child is alleged to have been "born out of wedlock." MCL 722.714.

The Paternity Act defines "[c]hild born out of wedlock" as

> a child begotten and born to a woman who was not married from the conception to the date of the birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage. [MCL 722.711(a).]

Thus, to establish that the child was born out of wedlock, plaintiff must prove that either (1) the child was not born or conceived during the mother's marriage, or (2) though the child was born or conceived during a marriage, a court has determined that the child was not the issue of the marriage.

Plaintiff filed this action alleging that he is the biological father of the defendant's father. However, it is undisputed that defendant was married to another man when the child was conceived. Plaintiff gave birth just four months after her divorce

was final. Therefore, to have standing to seek a determination of paternity, it is necessary for plaintiff to establish that a court "has determined" that there was a child born or conceived during the marriage and that the child was not an issue of the marriage. We recently reemphasized that "[t]he presumption that children born or conceived during a marriage are the issue of that marriage is deeply rooted in our statutes and case law. *In re KH, supra* at 634. The presumption of legitimacy can be overcome only by a showing of clear and convincing evidence. *Id.* at 634 & n 24.

In *Girard v Wagenmaker, supra* at 243, this Court held that in order for a biological father to establish standing under the Paternity Act, there must be a "prior court determination that a child is born out of wedlock." The requirement that there be a prior court determination is consistent with the language of the statute, MCL 722.711(a). As analyzed in *Girard*, supra at 242 (citations omitted):

> "[H]as determined" is the present perfect tense of the verb "determine." The present perfect tense generally "indicates action that was started in the past and has recently been completed or is continuing up to the present time," or shows "that a current action is logically subsequent to a previous recent action."

Girard noted that requiring a prior determination that a child is not an issue of a marriage comports with Michigan's longstanding presumption that children born or conceived during a marriage are legitimate issue of the marriage. *Girard, supra* at 246 (citing *Serafin v Serafin*, 401 Mich 629, 636; 258 NW2d 461 [1977]).

In this case, the question is whether the circuit court's statement in the judgment of divorce that there appeared to be no children born of or expected from the marriage was a court determination of sufficient specificity to lead to the conclusion that this child was not an issue of the marriage. Plaintiff asserts that this statement in the judgment of divorce qualifies as a court determination that the child was born out of wedlock and is not an

issue of the marriage. We disagree. A "determination" is that which sets the limits to or the bounds of something. *Webster's New World Dictionary* (3d ed), p 375. In its legal sense, a "determination" is that which "implies an ending or finality of a controversy or suit." *Black's Law Dictionary* (6th ed), p 450. To overcome the strong presumption of the legitimacy of a child born or conceived during a marriage, a court determination must settle with finality a controversy regarding the child's legitimacy.

This Court held as much in *Girard*, supra at 243, by concluding that where there was "[n]o previous action . . . undertaken to determine the child's paternity [and] no ongoing actions . . . to determine the child's paternity," there was no prior court determination that a child was not the issue of a marriage. Because there had been no previous action to determine that the child was born out of wedlock, *Girard* held that a putative father did not have standing to seek paternity under the Paternity Act. Similarly, we stated in *In re KH*:

> By requiring a previous determination that a child is born out of wedlock, the Legislature has essentially limited the scope of parties who can rebut the presumption of legitimacy to those capable of addressing the issue in a prior proceeding—the mother and the legal father . . . . If the mother or legal father does not rebut the presumption of legitimacy, the presumption remains intact, and the child is conclusively considered to be the issue of the marriage despite lacking a biological relationship with the father. [*In re KH*, supra at 635.]

Consistent with *Girard, and In re KH*, we hold that a court determination under MCL 722.711(a) that a child is not "the issue of the marriage" requires that there be an affirmative finding regarding the child's paternity in a prior legal proceeding that settled the controversy between the mother and the legal father.

In this case, the dissents assert that the legal findings necessary to meet the "prior adjudication" requirement for a paternity suit are established by the default judgment. The Court of

Appeals correctly recognized that "[a] default judgment is just as conclusive an adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following answer and contest." *Perry & Derrick Co, Inc v King*, 24 Mich App 616, 620; 180 NW2d 483 (1970). However, we disagree with the Court of Appeals conclusion and the dissents' assertion that the judgment of divorce in this case constitutes a "court determination" that the child was not an issue of the marriage under MCL 722.711(a). The holding in the default judgment that there were no children of the marriage simply does not address the similar but distinct question whether there was a child born or conceived during the marriage, and whether it was the issue of the marriage.

In short, there have been no legal actions addressing the subject child's paternity. The circuit court stated in the judgment of divorce merely that it appeared no children were born or expected of the marriage. The court's statement does not support a conclusion that "the court has determined [the child] to be a child born or conceived during a marriage but not the issue of the marriage." MCL 722.711(a). This conclusion is underscored by the requirement that a court find clear and convincing evidence that a child is not the issue of a marriage to overcome the presumed legitimacy of a child born or conceived during a marriage. *In re KH, supra* at 634 n 24. The circuit court did not make a finding that there was a child born or conceived during the marriage that was not an issue of the marriage. It, therefore, cannot be reasonably asserted that there was clear and convincing evidence of such a finding. For these reasons also, the court's statement that it appeared that no children were born or expected of the marriage is not a sufficient court determination that there was a child conceived during the marriage that was not an issue of the marriage.

Plaintiff also argues that the affidavit of parentage and the birth certificate assist him in his claim. Plaintiff argues that even if the judgment alone is insufficient, he should prevail because of the admissions inherent in these documents. We disagree. It was acknowledged in the affidavit of parentage and in the birth certificate that plaintiff was the biological father of the child. Yet,

despite these documents, the child is still presumed to be a legitimate issue of the marriage. An affidavit of parentage is a stipulation by a woman of a man's paternity under the Acknowledgment of Parentage Act, MCL 722.1001 et seq. This is not a court determination that the child was born out of wedlock, as is required under either the Paternity Act or the Acknowledgment of Parentage Act. Both acts provide that a child is born out of wedlock only when (1) the woman was not married at the time of the conception and birth, or (2) a court previously determined that the child was not an issue of the marriage. Further, a birth certificate is not a court determination that the child was not an issue of the marriage. For these reasons, the affidavit of parentage and the birth certificate do not rebut the presumption that the child was an issue of defendant's marriage to Charles. Charles is and remains the child's legal father, and it is incorrect to suggest our decision leaves this child without a father.

In this case, the subject child is presumed to be the issue of the marriage because the child was conceived during the marriage. The presumption remains until rebutted by clear and convincing evidence to the contrary. Consequently, the party wishing to overcome the presumption must present evidence that the child, despite the date of its conception, is not the issue of the marriage and a court must so hold. The circuit court's statement in the judgment of divorce that it appeared that there were no children does not rebut that presumption. Further, the legal father, Charles, never renounced the presumption of legitimacy. Because the child was not conceived outside of marriage, and because there is no prior court determination that the child is not an issue of the marriage, we hold that plaintiff does not have standing under the Paternity Act.

For these reasons, we reverse the judgment of the Court of Appeals and remand to the circuit court for entry of an order of summary disposition for defendant.

Elizabeth A. Weaver
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.

STATE OF MICHIGAN

SUPREME COURT

MICHAEL J. BARNES, JR.,

Plaintiff-Appellee,

v No. 129606

KIM KRISTINE JEUDEVINE,

Defendant-Appellant.

KELLY, J. (*dissenting.*)

I would deny leave to appeal in this case. I believe that plaintiff has standing to pursue his action under the Paternity Act, MCL 722.711 et seq. The Court of Appeals did not err in finding that defendant's default judgment of divorce contains a legally sufficient judicial determination that the child in question is not the issue of defendant's marriage.

THE UNDERLYING FACTS

Plaintiff had a sexual relationship with defendant while she was separated from her husband. It appears that she was four months pregnant with plaintiff's child when her husband, who did not know she was pregnant, was granted a default judgment of divorce. In it, the court stated, "it further appearing that no children were born of this marriage and none are expected . . . ."

This statement from the judgment appears to be accurate. Plaintiff and defendant signed an affidavit of parentage agreeing that plaintiff was the child's natural father. He was shown to be the father on the child's birth certificate. Plaintiff, defendant, and the child lived together as a family for nearly 4 ½ years before the parties separated. The child has always believed that plaintiff is his

father.

Plaintiff filed this claim for recognition of his paternity so he could continue fathering the child. In response, defendant neither admitted nor denied that plaintiff is the boy's father. Instead, she argued that plaintiff lacks standing to bring a paternity claim under applicable case law. *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991); *Aichele Hodge*, 259 Mich App 146; 673 NW2d 452 (2003); *Kaiser v Schreiber*, 469 Mich 944 (2003). The circuit court agreed with her. Plaintiff appealed.

The Court of Appeals reversed the circuit court decision. It concluded that the language in the divorce judgment that there were no children "born of this marriage and none are expected" was a judicial determination that the defendant's former husband is not the child's legal father. The majority rejects this conclusion, observing that a child's legitimacy should not be "decided by mere casual inferences . . . ." *Ante* at 5.

THE MAJORITY'S ERROR

This is not a case of mere casual inferences. Defendant was personally served with the complaint for divorce that affirmatively alleged that she was not pregnant. She did not answer the complaint. Nor did she contest entry of the default judgment of divorce. Had she done so, her son's paternity could have been, and presumably would have been, thoroughly litigated and scientifically determined. Her former husband's testimony under oath that he and defendant had no children and expected none provided legally sufficient support for the court's determination that "no children were born of this marriage and none are expected." In its ruling today, this Court rewards defendant for her refusal to reveal the fact of her pregnancy and the identity of her child's father while the divorce was pending.

Courts speak through their orders and judgments.[1] Default

[1] NCL 600.2106 provides, "A . . . judgment . . . of any court of record in this state . . . shall be prima facie evidence of . . . all facts recited therein . . . ." The default judgment of divorce at issue here

judgments are not lesser judgments by any means. Like other judgments, a default judgment of divorce operates as final statement of fact and law to the world.

In the matter that is before us, the paternity action, the majority appears to go behind the divorce judgment to nullify one of its findings. The finding is that defendant's husband did not father any of defendant's children. The majority does this despite the fact that the finality of the judgment is central to the orderly administration of justice. Plaintiff, like any other nonparty to a judgment, is entitled to rely on the judgment's recitation of facts and on the finality of its rulings.

The judgment in this case says that no children were born of the marriage. It follows that defendant's son is not an issue of defendant's marriage. It happens that the judge did not know that defendant became pregnant during the marriage. However, the judge's ruling that no children were born of the marriage is likely correct. There is no evidence, and no one is asserting, that defendant's son is an issue of the marriage. There is strong evidence that plaintiff is his biological father. In short, there is nothing to support a finding that the divorce judge's statement regarding the issue of the marriage was not accurate.

Under the circumstances of this case, the Court of Appeals was correct to reverse the judgment of the circuit court and remand the case for reinstatement of plaintiff's claim. Plaintiff properly relies on the default judgment of divorce to assert his standing to bring this paternity action. He should have the opportunity to assert his paternity. The availability of blood and DNA (deoxyribonucleic acid) testing makes a determination on the question relatively easy and accurate.

In this case, the majority again evidences a rigid adherence to wooden strictures such as the presumption of legitimacy even where, as here, the purposes of the presumption are not served. The majority has exhibited a consistent pattern of ruling against

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resolved the fact that Charles did not father any children with defendant. Until and unless it is reopened and amended, it is res judicata with respect to the findings therein.

putative fathers who seek to exercise their due process rights with respect to children they claim as their own.[2] Once again, the majority relies on the presumption of legitimacy despite strong evidence that the fact presumed to be true is false. In finding that defendant's former husband is the child's father, the Court is throwing into question part of the findings of the divorce judgment even though (1) the presumption of legitimacy has never been tested, and (2) the findings in the judgment are prima facie evidence that that child in question is not an issue of the marriage.

A presumption is a procedural device. *Widmayer v Leonard*, 422 Mich 280, 286; 373 NW2d 538 (1985). It operates during a legal proceeding. A rebuttable presumption is subject to being overcome, in the case of the presumption of legitimacy, by clear and convincing evidence. Unless the divorce proceeding is reopened, and the judgment amended under circumstances where both parties have notice and the opportunity to respond, the judgment's current findings are dominant legal facts. And plaintiff can properly rely on them to assert his standing to pursue his paternity action.

Surely, the presumption of legitimacy was not created to render children fatherless. Yet, that is precisely what the majority's application of it does in this case. As a practical matter, defendant's former husband will almost certainly never provide financial support for defendant's son. I am uncertain that the majority's statement that he is the child's legal father is correct. It is not clear what status the presumption of legitimacy has in light of the findings of the divorce judgment.

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[2] Recent cases in which the majority has denied standing or refused to consider granting standing to putative biological fathers for the avowed purpose of protecting the presumption are: *McNamara v Farmer*, 474 Mich 877 (2005); *Numerick v Krull*, 265 Mich App 232 (2005), lv den 474 Mich 877 (2005); *In re KH*, 469 Mich 994 (2004); *Kaiser v Schreiber*, 469 Mich 944 (2003); *Pniewski v Morlock*, unpublished opinion per curiam of the Court of Appeals, (June 5, 2003), Docket No. 238767, lv den 469 Mich 904 (2003), *In re CAW*, 469 Mich 192 (2003).

What is clear is that, as a practical matter, the child can expect to have no father in defendant's former husband. In the unlikely event that defendant should ever try to assert that her former spouse is the child's legal father, the consequences are predictable. If defendant sought to and succeeded in reopening the divorce proceedings to obtain support for the child from her former spouse, he would object. Presumably he would prove through DNA or blood test that he is not the biological father. The test results would provide clear and convincing evidence that would rebut the presumption of legitimacy.

For this reason, it is not to be anticipated that defendant will ever attempt to obtain a court order finding that her former spouse is the child's father. And plaintiff cannot seek to reopen the divorce case. *Killingbeck v Killingbeck*, 269 Mich App 132; 711 NW2d 759 (2005).[3] In effect, the majority has blocked plaintiff from ever having the legal right to father and support the child. As our Court observed 29 years ago, without dissent,

> "If the function of a court is to find the truth of a matter so that justice might be done, then a rule which absolutely excludes the best possible evidence of a matter in issue rather than allow it to be weighed by the trier of fact must necessarily lead to injustice. Further, when a court voluntarily blindfolds itself to what every citizen can see, the public must justifiably question the administration of law to just that extent." [*Serafin v Serafin*, 401 Mich 629, 635-636; 258 NW2d 461 (1977), quoting the Texas Court

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[3] In *Killingbeck*, a child's biological father moved to intervene in plaintiff's divorce case concerning custody issues. He was not the plaintiff's husband. The Court of Appeals noted that the trial court erred in granting his motion to intervene, saying, "Domestic relations actions are strictly statutory. The only parties to a divorce action are the two people seeking dissolution of their marriage. . . . [The biological father's] sole recourse on any issue involving his son was in the paternity action, not in the divorce action." *Id.* at 140 n 1.

of Civil Appeals in *Davis v Davis*, 507 SW2d 841, 847 (Tex Civ App, 1974).]

CONCLUSION

I would deny leave to appeal and remand this case to the trial court for a full hearing of plaintiff's paternity claim. Plaintiff should be accorded standing there. I would hold that defendant's judgment of divorce contains an effective finding by the divorce court that defendant's son was not an issue of her marriage. The judgment's failure to be more specific was caused solely by defendant's deception in keeping secret the fact that she was pregnant. There is strong, unrefuted evidence that any presumption that plaintiff's son was the issue of defendant's marriage would be rebutted if tested. Defendant has not chosen to test it; plaintiff cannot.

Defendant should not be heard now to rely on a presumption that she should have asserted in the divorce court. The majority apparently concludes that the presumption arose when her child was born and has force and effect outside and despite the language of the divorce judgment. Even if it were true, and I question it, defendant should not be permitted to rely on the presumption to defeat plaintiff's standing in his paternity action. If she wishes to assert is, defendant should seek to reopen the divorce case. For this court to place the presumption of legitimacy over the judgment of divorce is to allow defendant to defeat plaintiff's standing in the paternity action. This is despite the fact that the presumption that defendant relies on likely would have been rebutted already but for her deception of her husband and of the divorce court. The result is ill-reasoned and unjust.

Marilyn Kelly

STATE OF MICHIGAN

SUPREME COURT

MICHAEL J. BARNES, JR.,

Plaintiff-Appellee,

v No. 129606

KIM KRISTINE JEUDEVINE,

Defendant-Appellant.

MARKMAN, J. (*dissenting*.)

I respectfully dissent. I cannot join the majority's opinion, which would reverse the Court of Appeals, and which would deny plaintiff – who no one disputes is the biological father of the child at issue – the right to be the father of the child he has raised for over four years. Instead, the majority would leave this child without a father. In the process, the majority would render a default judgment in this case meaningless; it would condone and encourage gamesmanship by a party to a child custody proceeding; and it would allow a party to prevail, in a significant part because of that party's own delinquency in failing to participate in an earlier judicial proceeding.

BACKGROUND

Plaintiff alleges that he and defendant had a sexual relationship while defendant was still married to her ex-husband, James Charles. A child was conceived before defendant's divorce from Charles, but born four months after the divorce. Charles, who had filed for divorce, had no knowledge of the pregnancy because defendant did not appear in the divorce action, and the default divorce judgment stated that "it further appear[ed] that no children

were born of this marriage and none are expected . . . ." Plaintiff and defendant lived together with the child for nearly 4 ½ years after the divorce and before their separation; thereafter, defendant apparently denied plaintiff access to the child. Plaintiff claims that it has now been about 2 ½ years since he has seen his son.

Plaintiff filed a paternity action, but the circuit court granted summary disposition to defendant, ruling that the default divorce judgment did not amount to the prior judicial determination that Charles was not the father of the child conceived during the marriage, as required by Girard v Wagenmaker, 437 Mich 231; 470 NW2d 372 (1991), and, therefore, that plaintiff lacked standing to bring a paternity action. The Court of Appeals reversed, holding that the default divorce judgment did, in fact, constitute such a prior judicial determination.

ANALYSIS

The presumption that children born or conceived during a marriage are the issue of that marriage is deeply rooted in our statutes and has been consistently recognized throughout our jurisprudence. See *In re KH*, 469 Mich 621, 634-635; 677 NW2d 800 (2004). This presumption vindicates a number of interests, not the least of which include the interest of the child in not having his or her legitimacy called into question, the interest of the state in ensuring that children are properly supported, and the interest of both in assuring the effective operation of intestate succession. The presumption also reflects the recognition that "'[t]here is no area of law more requiring finality and stability that family law.'" *Id.* at 635 n27 (citation omitted.) For this reason, we have held that "clear and convincing evidence" is required in order to overcome the presumption of legitimacy. *Id.* at 634.

The title of the Paternity Act, MCL 722.711 et seq., states that the act is intended to "confer upon circuit courts jurisdiction over proceedings to compel and provide support of children born out of wedlock . . . ." See also *Van Laar v Rozema*, 94 Mich App 619, 622; 288 NW2d 667 (1980) ("intent behind this statute is to provide support for illegitimate children"). The act confers

standing on the father of a child born out of wedlock to sue to establish paternity. *In re KH*, supra at 631-632. Section 1 of the act provides the relevant definition:

> (a) "Child born out of wedlock" means a child begotten and born to a woman who was not married from the conception to the date of birth of the child, *or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage*. [MCL 722.711 (emphasis added).]

Thus, there are two ways to satisfy the definition of "child born out of wedlock" for purposed of the Paternity Act: (1) a showing that the child was neither born nor conceived during the mother's marriage or (2) a judicial determination that the child was not the issue of the marriage.

In Girard, we stated that the judicial determination referred to in the statute was a prior determination: "For a putative father to be able to file a proper complaint in a circuit court, . . . a circuit court must have made a determination that the child was not the issue of the marriage at the time of filing the complaint." *Girard, supra* at 242-243 (emphasis in original). The requirement of a prior determination that a child is born out of wedlock reflects a legislative recognition that paternity claims generally arise during divorce or custody disputes. *In re KH, supra* at 635. We have observed that this requirement suggests that the Legislature contemplated "'situations where a court in a prior divorce or support proceeding determined that the legal husband of the mother was not the biological father of the child.'" *Id.* (citation omitted). Such a prior determination is exactly what occurred in this case.

Defendant failed to respond to the complaint for divorce filed by her (now-ex) husband, and a default judgment of divorce ultimately was entered. It has long been the rule in this state that the entry of a default judgment has the legal effect of admitting all well-plead allegations. See, e.g., *Lesisko v Stafford*, 293 Mich 479, 481; 292 NW 376 (1940); *Wood v Detroit Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982); *Kalamazoo Oil Co v Boerman*,

242 Mich App 75, 79; 618 NW2d 66 (2000). In paragraph 5 and 6 of his complaint for divorce, Charles alleged that defendant was not pregnant and that no children were born during the marriage. Because defendant never appeared, she was defaulted, the legal effect of which was her admission that she was not pregnant and that no children were born during the marriage. Although it was clearly factually incorrect that defendant was not pregnant on the date of the entry of the default divorce judgment, the legal effect of her default was an admission that she was not pregnant on the date of the divorce. Because defendant never sought to set aside the default judgment and never appealed the judgment, it continues to stand for the proposition that no issue resulted from her marriage to Charles, that is, necessarily, that any child born after the date of the divorce was a "child born out of wedlock" for purposes of the Paternity Act, MCL 722.711(a).

Moreover, the default judgment states, in pertinent part:

> [I]t satisfactorily appears to this Court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed, and there remains no reasonable likelihood that the marriage can be preserved; it further appearing that no children were born of this marriage and none are expected . . . ." [Emphasis added.]

The majority suggests that this statement did not constitute an "affirmative finding regarding the child's paternity," *ante* at 8. I respectfully disagree. The plain language of the judgment could hardly be clearer: "no children were born of this marriage and none are expected[.]" Once more, "no children were born of this marriage and none are expected[.]" The trial court thus concluded, not unreasonably, that no children were born of the marriage of Charles and defendant. As such, the child later born to defendant must, for purposes of the Paternity Act, MCL 722.711(a), have necessarily been a "child born out of wedlock."

The majority further suggests that it "cannot be reasonably asserted that there was clear and convincing evidence" to support

the language in the default judgment. *Ante* at 9. Again, I must disagree. The proofs submitted at the hearing consisted entirely of Charles' testimony. Charles testified under oath, among other things, that "my wife is not pregnant at this time to the best of my knowledge." After hearing the testimony, the trial court stated:

> I find *from the proofs submitted* there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable opportunity for the marriage to be preserved. *Accordingly, the Court hereby has signed the judgment as prepared and presented.* [Emphasis added.]

In other words, the trial court considered the evidence presented at the hearing and issued its judgment on the basis of that evidence. Among the evidence presented was Charles' express testimony that defendant was not pregnant. The language used in the default judgment is a function of this evidence; there is no requirement that a pregnancy test be administered before a trial court may rely on the uncontradicted statement of the husband that his wife is not pregnant. The trial court's order and its statement on the record are both quite clear, and completely contradict the majority's suggestion that the judgment was not supported by clear and convincing evidence.

"The rule is well established that courts speak through their judgments and decrees . . . ." *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977); see also *Newbold v Stewart*, 15 Mich 155 (1866). With respect to default judgments, the instant Court of Appeals panel observed:

> "A default judgment is just as conclusive an adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following answer and contest." *Perry & Derrick Co v King*, 24 Mich App 616, 620; 180 NW2d 483 (1970). See also *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991). Respecting defaults, in their factual

as well as legal components, is a function of the policy of respecting the finality of judicial judgments. See, e.g. *Nederlander v Nederlander*, 205 Mich App 123, 126; 517 NW2d 768 (1994). If the trial court's equivocation about there merely "appearing" to be no children of the marriage did indeed reflect the court's lack of opportunity to consider the factual matter fully, it nonetheless reflected no lack of legal authority behind the substance implicit in that unchallenged ruling. [Unpublished opinion per curiam of the Court of Appeals, issued August 23, 2005 (Docket No. 252840), slip op at 2.]

The Court of Appeals analysis regarding the force and effect of default judgments was entirely correct. Defendant's ex-husband testified in the divorce action that there were no children produced as a result of the marriage, and defendant did not appear to contest that representation, which was the legal equivalent of her admission of its truth. The judgment of divorce recognized that no children resulted from the marriage, i.e., that Charles was not the father of any children. It is difficult to imagine evidence more "clear and convincing" of a fact than one party's assertion of that fact under oath and the opposing party's admission of that fact. Accordingly, the legal presumption that a child is factually the offspring of the mother's husband was addressed and fully repudiated in this case by the default judgment of divorce. The Court of Appeals, therefore, did not err in concluding that plaintiff had standing to bring this paternity action.[1]

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[1] The majority views as significant the fact that, along with the finding that no children were born to or conceived by the parties during their marriage, the circuit court did not also make an explicit finding that a child was conceived during the marriage. *Ante* at 9. However, given the determination of the trial court – that "no children were born of this marriage and none are expected"—it is nothing more than a matter of logic that the child here was "conceived during a marriage but not the issue of that marriage." MCL 722.711(a).

Moreover, I note that a finding that defendant was not pregnant with Charles's child was, in fact, necessary for the trial court to have entered the default judgment of divorce. MCL 552.9f sets forth certain procedural requirements in an action for divorce and provides, in pertinent part:

> No proofs or testimony shall be taken in any case for divorce until the expiration of 60 days from the time of filing the bill of complaint, except where the cause for divorce is desertion, or when the testimony is taken conditionally for the purpose of perpetuating such testimony. In every case where there are dependent minor children under the age of 18 years, no proofs or testimony shall be taken in such cases for divorce until the expiration of 6 months from the day the bill of complaint is filed. [Emphasis added.]

Under this provision, no proofs or testimony can be heard in a divorce action in which children are involved until at least six months from the time of the filing of the complaint.[2] Charles filed the divorce action on June 23, 1998, and the judgment of divorce was entered on November 2, 1998. Thus, the judgment of divorce granted to Charles and defendant was entered just over four months from the time of the filing of the complaint for divorce. Because a court may grant a divorce after only 60 days have elapsed when no minor children are involved, but may not grant a divorce until six months have elapsed when minor children are involved, the trial

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[2] MCL 552.9f does provide an exception:

> In cases of unusual hardship or such compelling necessity as shall appeal to the conscience of the court, upon petition and proper showing, it may take testimony at any time after the expiration of 60 days from the time of filing the bill of complaint.

However, there is no indication whatsoever that this exception was invoked in the instant divorce.

court *necessarily* must have concluded from the evidence presented, i.e., Charles's testimony, that defendant was not pregnant and, therefore, that no issue resulted from the marriage.[3] While later events subsequently proved this conclusion incorrect, they do not alter the fact that the trial court did, in fact, enter this finding. A court issuing a default judgment can only work with the information actually presented to it, but this does not alter the legal effect of its factual conclusions.

In reaching its conclusion, the majority renders the default judgment in this case essentially meaningless. The majority suggests, in effect, that a judicial determination requires that the court, in its decision-making, be fully aware of all the facts. However, in a default setting, where one party has failed to appear, it is obviously not always possible for the court to be fully aware of all pertinent facts. After all, one side has chosen to deprive the

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[3] The majority recognizes that a "'default judgment is just as conclusive as an adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following answer and contest,'" *ante* at 8, quoting *Perry & Derrick Co v King*, 24 Mich App 616, 620; 180 NW2d 483 (1970). However, the majority proceeds promptly to disregard this basic principle by suggesting that the judgment of divorce was not a sufficient "court determination." *Ante* at 8. Yet, as noted above, under MCL 552.9f, the finding that the parties produced no issue was "essential to support the judgment." *Perry, supra* at 620. Moreover, had defendant appeared at the divorce proceeding, and answer to the question whether it had been shown by clear and convincing evidence that Charles fathered no children would have been "rendered following answer and contest." *Id.* Because *defendant* did not appear in that action, the question was decided against her. As such, the fact that Charles did not father a child with defendant was definitively resolved by the default judgment of divorce. The question of what legal standard should have been used to resolve the underlying question, in the absence of an appeal of that issue, is irrelevant to the fact that the judgment resolves the question.

court of the facts of which its witnesses presumably are aware. However, this has never been thought to relieve the trial court of its obligation to render a "determination" in such a case on the basis of as many facts as have been made available to the court. This is simply in the nature of default judgments. It is for this reason, among others, that parties to judicial proceedings would be prudent to show up for such proceedings.

The majority, wrongly in my view, characterizes the trial court's order as an equivocation because of its reference in its order to "it satisfactorily *appears*" and "it further *appearing* . . . ." Quite apart from the fact that such language is entirely unremarkable in judicial orders, and has never before been thought to evidence "equivocation," the reality is that a prudent court could well choose to employ such language in virtually every order given that it is not omniscient and can only render decisions on the basis of evidence properly before it. The majority would transform entirely innocuous and customary language, routinely employed by courts, probably from time immemorial, into language pregnant with meaning, showing hesitation and uncertainty on the part of the court. Better apparently for the court to affect an all-knowing certainty of facts than to reveal the ordinary cautiousness of a person who understands the fallibilities of the judicial process. The majority's deconstruction of court orders notwithstanding,[4] whether a court states that something "appears to be," rather than that it "is," does not deprive an order of the full force of judicial

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[4] One wonders whether orders in which courts "believe" or "find" a particular fact satisfies the requirements of certitude established today by the majority. Moreover, it is noteworthy that the standard language this court employs in denying a motion for reconsideration asserts that the motion is being denied because "it does not appear" that the initial order was entered erroneously. See e.g., *McDaniel v Hemker*, 714 NW2d 301 (2006). In light of this Court's obvious "equivocation" in such circumstances, one wonders whether parties who have received such orders are entitled to successive motions for reconsideration until we are certain enough to deny such motions unequivocally.

authority.[5] Rather, a judgment – a default judgment no less than any other—represents to the world a binding determination concerning the issues pertinent to the judgment, and persons may not avoid the legal effect of such a judgment by attempting to relitigate the facts that underlie it.[6]

Here, defendant failed to appear in the divorce action. Had she done so, she could have contested the trial court's conclusion that "no children were born of this marriage and none are expected[.]" Yet, by failing to appear, she failed to contest that conclusion, and the court entered a judgment based on the best information available to it at the time. Because the power to correct this determination rested at all times solely in defendant, she in particular should now be bound by that determination, rather than being allowed to profit from her own dereliction, as the majority permits—if, indeed, denying her son the right to a father he has known since birth can be considered "profiting." The majority thus allows a party to prevail in this case in significant part because of that party's own delinquency in failing to

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[5] The practical consequences of the majority's approach would be that default judgments would effectively always be in suspense pending additional information being made available to the judicial system, most typically, perhaps, from the defaulting party itself. While default judgments rarely constitute the ideal means or rendering a judicial "determination," such procedures nevertheless is necessary to the orderly administration of justice, and the factual determinations made in accord with a default are just as binding as facts determined in judgments entered with the benefit of advocacy on both sides.

[6] In arguing that the pertinent language of the divorce judgment does not constitute a sufficient determination that Charles was not the father of her child, plaintiff is essentially mounting a collateral attack on the divorce judgment. Because defendant did not seek leave to appeal the trial court's order in the divorce proceeding (or even participate[sic] in the proceeding), she should not be allowed to collaterally attack that order in this case. See People v Sessions, 474 Mich 1120 (2006).

participate in an earlier judicial proceeding.

As already noted, on of the Legislature's stated purposes in enacting the Paternity Act was "to compel and provide support of children born out of wedlock . . . ." Title of 1956 PA 205, MCL 722.711 *et seq*. The majority's decision today frustrates that purpose in the case of this child. In reversing the Court of Appeals, the majority ensures that plaintiff has no legal obligation to provide support for this child. Moreover, because it seems clear that defendant has no intention of bringing a claim for support against her ex-husband, and if she ever did, could not prevail in that claim because Charles is obviously not the child's father, the majority also ensures by its decision today that this child will not receive support from any father. In other words, were defendant to seek support from her ex-husband, her child would almost certainly become—even under the majority's holding—a "child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage," MCL 722.711(a), affording plaintiff unquestionable standing to bring a paternity action. Clearly, as shown by the facts of this case, defendant has no interest in that outcome. As such, the majority provides defendant with its blessing to neglect to seek the support to which her child is entitled, solely for reasons of legal strategy. Thus, the majority sanctions defendant's legal gamesmanship at the expense of the well-being of her child.

This result is especially troubling in light of the continuing concern on the part of both the public and the members of this Court about fathers unwilling to financially support their children. The majority here rejects a father who welcomes the opportunity to take responsibility for his child, and who has acted as a father for more than four years, in favor of no father at all.[7]

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[7] The majority argues that I am incorrect to suggest that its decision leaves this child without a father, and instead asserts that *Charles* is the child's legal father. *Ante* at 10. However, it is the majority that is, tragically incorrect. The plain language of the judgment states that Charles is not the father of any children borne by defendant. Because this judgment is res judicata of the issue as between

Although I believe strongly in the importance of the presumption of legitimacy, that presumption has been rebutted by clear and convincing evidence in this case. Defendant's ex-husband alleged that there were no children produced as a result of the marriage, and he testified to that effect at the divorce hearing. Defendant failed to appear at the hearing, which constituted a legal admission that there were no children of the marriage. The divorce judgment asserted that no children resulted from the marriage and, therefore, that Charles was not the father of any children. After the child was born, a birth certificate was prepared identifying plaintiff as the father. An affidavit of parentage was signed by the parties.[8] The parties lived together with the child as a family for over four years. And, defendant has never denied that plaintiff is the father of her child. Plaintiff was a father to a little boy—a little boy who stands to suffer greatly from the majority's decision today, both

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Charles and defendant, defendant would have to take *additional action* (for instance, bringing a motion to revise or alter the judgment under MCL 552.17[1]) in order for the status quo to be altered and Charles to be declared the child's father. Charles doubtlessly would be shocked to learn that the majority believes he is the father. He is not, either biologically or legally.

Moreover, as I have pointed out elsewhere, there is no chance that this status quo will ever be altered because: (a) defendant almost certainly will never bring a motion to revise or alter, knowing that it would be successfully challenged by Charles and that this would allow plaintiff to relitigate his paternity, something that defendant is plainly not prepared to allow; and (b) it is clear to everyone, the majority excepted, that the status quo accurately reflects the truth of the situation, namely that Charles is not the father of the child.

[8] The affidavit provides that the parties "consent that the name of the natural father may be included on the certificate of birth for the child" and that "mother states that she was not married when this child was born or conceived; or that this child though born or conceived during marriage, is not an issue of that marriage as determined by a court of law."

financially and emotionally. Yet the majority finds that there is no "clear and convincing" evidence that *Charles* was not the father of defendant's child. I could not disagree more strongly.

CONCLUSION

In adopting defendant's position that the divorce judgment was insufficient to establish that her child was born out of wedlock, the majority renders a default judgment in this case meaningless; it condones and encourages gamesmanship by a party to a child custody proceeding; and it allows a party to prevail, in significant part, because of that party's own delinquency in failing to participate in an earlier judicial proceeding. For the foregoing reasons, I would affirm the decision of the Court of Appeals and hold that plaintiff has standing to pursue a paternity action.

Stephen J. Markman
Michael F. Cavanagh

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL J. BARNES, JR.	UNPUBLISHED August 23, 2005
Plaintiff-Appellant,	
v	No. 252840 Kalamazoo Circuit
Court KIM KRISTINE JEUDEVINE DP	LC No. 03-006657-
Defendant-Appellee.	

Before: Zahra, P.J., and Gage and Murray, JJ.
PER CURIAM.

Plaintiff appeals by leave granted from the order of the circuit court dismissing his paternity claim against defendant on the ground that he lacked standing. We reverse and remand for reinstatement of plaintiff's claim. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant and her husband separated, and defendant began a relationship with plaintiff. Defendant's husband flied for divorce, and maintained that there were no children born of the marriage, and that none was expected. A default judgment was entered, reflecting defendant's position: "it further appearing that no children were born of this marriage and none are expected . . . ."

The judgment of divorce was entered on November 2, 1998. Nearly four months afterward, defendant gave birth to a son, who shares his surname with plaintiff. Defendant had made no mention of a pregnancy to her husband or to the trial court (she took no part in the proceedings below) while the divorce was pending. An affidavit of parentage, signed by the state registrar, attests that both parties in this action acknowledged plaintiff's paternity of the child

by their signatures on February 27, 1999, according to "parentage facts on file in the Michigan Department of Community Health. . . ."

The parties discontinued their relationship, and plaintiff asserted parental rights. The trial court held that plaintiff lacked standing to assert parentage of a child presumably conceived during defendant's marriage to another man. The court recited caselaw establishing the strong presumption that the husband is the father, and concluded that the default divorce judgment terminating defendant's marriage did not actually determine the question of defendant's husband's paternity for purposes of allowing plaintiff to proceed with a paternity action.

We review a trial court's decision on a motion for summary disposition de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Whether a party has standing to bring an action likewise presents a question of law, that we review de novo. *In re KH*, 469 Mich 621, 627-628; 677 NW2d 800 (2004).

The Paternity Act[4] confers standing on the father of a child born out of wedlock to sue to establish paternity. *McHone v Sosnowski*, 239 Mich App 674, 677; 609 NW2d 844 (2000); MCL 722.714(1) and (8). The act defines a child born "out of wedlock" as one "begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." MCL 722.711(a). Under the second clause, standing to assert parentage requires an earlier judicial determination that the child is not an issue of the marriage. *McHone, supra* at 677-678.

At issue is whether the language in the default divorce judgment about there "further appearing that no children were born of this marriage and none are expected" constitutes a judicial determination that defendant's ex-husband is not the father of the child conceived during the marriage. We conclude that it does. The language of the judgment indicates that no children were born of the marriage, and that none were expected to be born.

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[4] MCL 722.711 *et seq.*

"A default judgment is just as conclusive as adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following answer and contest." *Perry & Derrick Co v King*, 24 Mich App 616, 620; 180 NW2d 483 (1970). See also *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991). Respecting defaults, in their factual as well as legal components, is a function of the policy of respecting the finality of judicial judgments. See, e.g. *Nederlander v Nederlander*, 205 Mich App 123, 126; 517 NW2d 768 (1994). If the trial court's equivocation about there merely "appearing" to be no children of the marriage did indeed reflect the court's lack of opportunity to consider the factual matter fully, it nonetheless reflected no lack of legal authority behind the substance implicit in that unchallenged ruling.

Where a husband seeking a divorce decree expresses no knowledge whether a pregnancy is in progress, and the ensuing default judgment is then silent on the question of paternity, the issue of paternity is not determined for purposes of creating standing to assert paternity in a later action. *Dep't of Social Services v Baayoun*, 204 Mich App 170, 176; 514 NW2d 522 (1994). The instant case, however, is distinguishable from Baayoun, in that here the divorce judgment does indeed address the question of paternity, effectively reciting that the husband was not responsible for any children. "The rule is well established that courts speak through their judgments and decrees . . . ." *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977).

In this case, the legal presumption that a child is factually the offspring of the mother's husband was answered, and repudiated by the language within the default judgment.[5] Plaintiff

[5] *In re CAW*, 469 Mich 192; 665 NW2d 475 (2003) does not apply to this case. That case did not involve or contain any discussion about standing under the paternity act. Instead, it involved standing to intervene in a termination case. A subsequent case, not cited by either party, *In re KH*, supra, does address standing under the paternity act, but in that case the plaintiff did not have a prior determination that the child was not born of the marriage. *In re KH, supra* at 632. Because of the standing definition under the paternity act, the default judgment determination grants plaintiff standing.

therefore had standing to bring this paternity action. *McHone, supra.*

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Hilda R. Gage
/s/ Christopher M. Murray

STATE OF MICHIGAN
9TH JUDICIAL CIRCUIT COURT – FAMILY DIVISION
1400 Gull Road, Kalamazoo, Michigan 49048

Michael Barnes,
Plaintiff

V

DP
Kim Kristine Jeudevine,
Defendant.

Hon. Carolyn H. Williams
Circuit Court Judge
File No. F 03-6657

Jeffrey M. Gagie (P49822)
Attorney for Plaintiff
249 East Michigan Avenue
Paw Paw, Michigan 49079

Sidney D. Durham (P13040)
Attorney for Defendant
Butler, Durham & Toweson
202 North Riverview Drive
Parchment, Michigan 49004

ORDER GRANTING MOTION TO DISMISS

At a session of said Court held in the City
and County of Kalamazoo, State of Michigan,
on the 26th day of November, 2003.

This matter having been brought on to be heard on the Defendant's Motion to Dismiss and the Court having heard arguments of counsel and otherwise being fully advised in the premises; now, therefore

IT IS HEREBY ORDERED AND ADJUDGED the Defendant's Motion to Dismiss is granted and the within action is dismissed.

s/_____
Hon. Carolyn H. Williams, Circuit Judge

Service of a copy of this document was made this date upon all parties, or their attorneys of record, by delivery or mail pursuant to

MCR 2.107©. I declare that the above is true to the best of my knowledge, information and belief.

Dated: 11-11-03 s/_____

Erin K. Kynaston

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF
KALAMAZOO
FAMILY DIVISION

JAMES VINCENT CHARLES III
File No. D98-1928-DO

Plaintiff,

vs. HONORABLE PHILIP D. SCHAEFER
JUDGE (P19949)

KIM KRISTINE CHARLES,
Defendant

PLAINTIFF in Pro Per

JUDGMENT OF DIVORCE

At a session of said Court held in the City of Kalamazoo, County of Kalamazoo, State of Michigan, this 2nd day of November 1998.

PRESENT: HONORABLE PHILIP D. SCHAEFER
JUDGE

The above-entitled matter having come on to be heard upon the Plaintiff's Complaint for Divorce, the Default of the Defendant for failure to answer having been entered, and the Plaintiff having appeared in pro per, and the proofs having been taken in open court in this cause, and on reading the Complaint and the hearing of the proofs, taken as before said, from which it satisfactorily appears to this Court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed, and there remains no reasonable likelihood that the marriage can be preserved; it further appearing that no children were born of this marriage and none are expected;

NOW, THEREFORE, on motion of Plaintiff, IT IS HEREBY ORDERED AND ADJUDGED, and this Court, by virtue of the authority therein vested, and in pursuance of the

statute in such case made and provided, DOTH ORDER AND ADJUDGE that the marriage between the parties shall be and the same is hereby dissolved, and a divorce from the bonds of matrimony between the parties is also ORDERED AND ADJUDGED.

ALIMONY

IT IS FURTHER ORDERED AND ADJUDGED that neither party is entitled to alimony and it is forever barred.

INSURANCE PROVISION

IT IS FURTHER ORDERED AND ADJUDGED that all rights of either party in and to the proceeds of any policy or contract of life insurance, endowment or annuity upon the life of the other party, in which he or she was named or designated as beneficiary, or to which he or she became entitled by assignment or change of beneficiary, during the marriage of the parties or in anticipation thereof, whether such contract or policy was heretofore or shall be hereafter written or become effective, shall hereupon become and be payable to the estate of the insured, or such named beneficiary as he or she shall affirmatively designate.

STATUTORY PENSION PROVISION

IT IS FURTHER ORDERED AND ADJUDGED that all rights of the parties in and to any vested pension, annuity, retirement benefits, accumulated contributions in any pension, annuity or retirement system, and any rights or contingent rights in and to unvested pensions annuities, or retirement benefits of the other, are hereby terminated, except as otherwise set forth in this Judgment of Divorce.

PROPERTY SETTLEMENT AND PROVISION IN LIEU OF DOWER

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff shall have and keep as his sole and separate property, free and clear of any and all claims of the Defendant, all personal property now in his possession.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant shall have and keep as her sole and separate property, free and clear of any and all claims of the Plaintiff, all personal property now in her possession.

IT IS FURTHER ORDERED AND ADJUDGED that any liens or mortgages against the property above-mentioned shall be paid by the person receiving said property, and said parties shall hold each other free and harmless from any and all liability from said lien or mortgage.

IT IS FURTHER ORDERED AND ADJUDGED that each party shall be responsible for his or her own debts since the date of separation and shall hold the other harmless for said debts. The parties' date of separation is 05/20/98.

IT IS FURTHER ORDERED AND ADJUDGED that the provisions for the Plaintiff in this Judgment of Divorce shall be in lieu of his/her dower and or statutory share interest in the lands of the Defendant, and the provisions made herein for the Defendant shall be in lieu of his/her dower in the lands of the Plaintiff, and they shall each hereafter hold their remaining lands free, clear and discharged form [sic] any such dower rights, claims or interests and said provisions shall also be in full satisfaction of all claims, rights or interests they may have in any property which the other owns or may hereafter own, or in which the other has or may hereafter have any interest.

DOCUMENTS

IT IS FURTHER ORDERED AND ADJUDGED that each party shall forthwith execute and deliver to the other, all documents necessary to carry out the terms of this Judgment and upon failure to do so, a certified copy of this Judgment shall stand in lieu thereof and may be recorded with the same effect as though any deed, assignment or other document had been personally executed by the parties.

RESTORATION OF NAME

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant shall be and is hereby restored the name of Kim Kristine Jeudevine.

WHEN JUDGMENT BECOMES FINAL

This Judgment shall become final as of this date.

s/_____
Philip D. Schaefer

Judge
File No. D98-1928-DO

DEPARTMENT OF COMMUNITY HEALTH
Division for Vital Records & Health Statistics

1999011388
State File Number

AFFIDAVIT OF PARENTAGE

We affirm under penalty of perjury that we are the natural parents of:

McClain	Michael	Barnes
(First)	(Middle)	(Last)

who was born in Bronson Methodist Hosp. Ka, Kalamazoo,
(Hospital Name, City, County, State)
Michigan on 2/26/1999
(Date of birth)

and that we sign this affidavit to establish the paternity for this child. We hereby consent that the name of the natural father may be included on the certificate of birth for the child.
We wish the child's name to be recorded as:
In signing this form, we understand that:

a) Completion of the acknowledgement is voluntary.
b) The mother has custody of the child unless otherwise determined by the court or agreed by the parties in writing.
c) Either parent may assert a claim in court for parenting time or custody.
d) Both parents have a right to notice and a hearing regarding the adoption of the child.
e) Both parents have the responsibility to support the child and to comply with a court or administrative order for the child's support.
f) By signing this acknowledgement, we waive the following:
    i) The right to blood or genetics tests to determine if the man is the biological father of the child

ii) Any right to a court appointed attorney, including the prosecuting attorney, to represent either party in a court action to determine if the man is the biological father of the child,

iii) The right to a trial to determine if the man is the biological father of the child.

Further, the mother states that she was not married when this child was born or conceived; or that this child, though born or conceived during a marriage, is not an issue of that marriage as determined by a court of law.

FATHER	MOTHER
Name Michael J Barnes, Jr.	Kim Kristine Jeudevine
1409 Winton	1409 Winton
Current Address	
Kalamazoo, Michigan 49001	Kalamazoo, Michigan 49001
City State Zip	
Date of Birth 02/19/1961	07/24/1957
State or Country of Birth Michigan	Michigan
Social Security Number 379807857	379704189
Date Signed 02/27/1999	02/27/1999

I hereby certify that the above is a true and correct representation of the parentage facts on file in the Michigan Department of Community Health Lansing, Michigan.

Certified by: Date Issued: 7/31/03

s/_____

Carol V. Getts

State Registrar

Amendment V of United States Constitution
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1, of United States Constitution
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257

State Courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Michigan Compiled Laws § 722.711
Definitions.
Sec. 1. As used in this act:

(a) "Child born out of wedlock" means a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage.

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL J. BARNES JR.,
Plaintiff - Appellee,

Supreme Court No.: 129606
Court of Appeals No.: 252840
Trial Court Case No.: F03-006657-DP

v.

KIM KRISTINE JEUDEVINE,
Defendant - Appellant.
_____/

Jeffrey M. Gagie (P49822)
Attorney for Plaintiff–Appellee
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269/655-1118

Sidney D. Durham (P13040)
Leslie L. Payseno (P63935)
George T. Perrett (P42751)
Attorneys for Defendant
Appellant Butler, Durham &
Toweson, PLLC
202 North Riverview Drive
Parchment, Michigan 49004
269/349-7686
_____/

PLAINTIFF - APPELLEE'S MOTION for RECONSIDERATION, REHEARING, and, OTHER RELIEF

Now comes Plaintiff - Appellee, hereinafter Appellee, by and through his attorney, Jeffrey M. Gagie, and for this Motion states the following:

Appellant sought leave from this court to appeal a decision

of the Michigan Court of Appeals. This court ordered its clerk to schedule oral arguments on the application, pursuant to MCR 7.302(G)(1), to determine whether or not to grant Appellant's application. This court asked the parties to include among the issues addressed:

> (1) [W]hether plaintiff lacked standing to proceed under the Paternity Act, MCL 722.711 et seq., where the subject child's mother was married at the time of the child's conception, see *Girard v Wagenmaker*, 437 Mich 231 (1991); and (2) whether the default judgment of divorce amounted to a judicial determination that the child was born or conceived during the marriage but not the issue of the marriage.

Oral arguments were scheduled and conducted on April 4, 2006. This court issued an Opinion on July 26, 2006. Appellee requests the relief described, infra, pursuant to MCR 7.313(D), and (E), and MCR 7.316.

The majority opinion relies on *Girard v Wagenmaker, supra* at 242 (citations omitted) to support its conclusion. However, this reliance is misplaced. *Girard* is not analogous to the case at bar for one simple reason: *Girard* was a timing issue regarding a judicial determination; the case at bar involves the sufficiency of what Appellee, the Court of Appeals, and three dissenting Justices consider a judicial determination that already existed. The two involve the Paternity Act, but that is the extent of meaningful similarities. The Court of Appeals had not conducted a thorough analysis of *Girard* because it correctly recognized that it was not on point. Similarly, the two Supreme Court dissenting opinions relied on rationale rather than comparing or contrasting *Girard*; it is simply irrelevant to the core issue here.

Rather than address each and every point in the majority opinion with which Appellee has concerns, for purposes of brevity Appellee respectfully directs the reader to the dissenting opinions of Justices Kelly and Markman incorporated herein by reference.

They include excellent reasoning as to why this case should be given more attention.

The opinion issued July 26, 2006 was following only briefs and oral arguments on whether to grant leave for Appellant's application. The legal implications that will flow from this opinion are much too broad and deep to have been created on this Supreme Court record. The interests of justice require that this court consider these issues in more detail, with more information from the parties; it is not a stretch to expect numerous briefs from Amicus curiae.

For example, there can be no doubt that this opinion impacts Appellee's fundamental Constitutional rights as applied to the states through the Fourteenth Amendment to the United States Constitution. The United States Supreme Court addressed limitations that should be placed on the state according to the nature of the relationship involved in *Roberts v United States Jaycees*, 468 U.S. 609, 618-621, 104 S.Ct. 3244, 3250 82 L.Ed.2d 462 (1984). The court stated:

> The court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formulation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.... The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family—marriage ... childbirth ... the raising and education of children ... and cohabitation with one's relatives.... Family relationships, by their nature involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's

life. (Citations omitted, emphasis added.)

In Michael H. v. Gerald D., 491 U.S. 110, 128-129, 109 S.Ct. 2333, 2345 (1989), the Court considered the case of a biological father seeking paternity though the mother remained married to the husband throughout the entire period between conception of the child at issue, and the litigation. The obvious difference between *Michael H.* and the case at bar is that in the case at bar the husband obtained the Default Judgment of Divorce before the child was born; Appellee then pursued paternity. Justice Scalia wrote:

> In *Lehr v. Robertson*, a case involving a natural father's attempt to block his child's adoption by the unwed mother's new husband, we observed that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring," and we assumed that the Constitution might require some protection of that opportunity. Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter. In *Lehr* we quoted approvingly from Justice Stewart's dissent in *Caban v. Mohammed*, 441 U.S., at 397, 99 S.Ct., at 1770, to the effect that although "'[i]n some circumstances the actual relationship between father and child may suffice to create in the unwed father parental rights comparable to those of the married father, '" "'the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist.'" In accord with our traditions, a limit is also imposed by the circumstance that the

> mother is, at the time of the child's conception and birth, married to, and cohabiting with, another man, both of whom wish to raise the child as the offspring of their union. (Citations omitted.)

Justice Scalia's point is worthy of repeating on its own, "'[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring,' and we assumed that the Constitution might require some protection of that opportunity." *Id.* Surely the reader can recognize how Justice Scalia's comments dovetail with the facts of the case at bar. Appellee is free of the factors that were the undoing for Michael H.; ipso facto, even Justice Scalia would approve of the idea that Appellee has some rights comparable to those of a married father, and he would go so far as to assume that the Constitution might require some protection for him. *Id.*

Appellee also argues that requirements of procedural due process prevent the State from terminating his liberty interest in his relationship with McClain Michael Barnes without affording him an opportunity to demonstrate his paternity in an evidentiary hearing. In addition, Appellee submits that his established parental relationship with McClain Michael Barnes in conjunction with the Default Judgment of Divorce, the Affidavit of Parentage, and the Birth Certificate outweighs as a matter of substantive due process any interest the State may have in its presumption of legitimacy and preventing him from even standing to pursue a paternity claim. Remember, Appellee is not seeking a finding from this court that he is McClain's father. Appellee simply wants the opportunity to pursue a claim. (It is undisputed however, that such a claim will result in a finding that Appellee is the biological father.)

The United States Supreme Court has considered due process rights many times. In *Matthews v Eldridge*, 424 U.S. 319, 334-335, 6 S.Ct. 893, 903 (1976), the court recognized that "'[d]ue process, 'unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." "Due process is flexible, and calls for such procedural protections as the

particular situation demands." (Citations omitted.) The *Matthews* court went on to state that,

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* (Citations omitted.)

In *Girard, supra*, this court provided a thorough history of the Paternity Act. According to *Girard*, in 1820 the Michigan Legislature enacted the first act similar to the Paternity Act. Needless to say, it was amended through the years. When the act was enacted, and for even most of its life, the act has served an important societal interest. However, the interests served by the act have evolved over time in a way that has left the interpretation and implementation of the act in the Nineteenth Century. A review of a couple of other Nineteenth Century cases is in order to highlight some of the dramatic changes in other areas of law.

In *Bradwell v State of Illinois*, 83 U.S. 130, 141 (Wall.) 1872, the issue was whether a woman could obtain a license to practice law in the State of Illinois. This was one of the Slaughter-House cases. (This was fifty-two years after the first version of a Paternity Act, and thirty-two years after it had been renamed the Bastardy Act. No doubt the precursor of today's Paternity Act was considered well-established law.) In a concurring opinion, Mr. Justice Bradley wrote:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is,

> or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state. ... The paramount destiny and mission of woman [sic] are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

Another interesting read from the Nineteenth Century is *Plessy v Ferguson*, 163 U.S. 537, 550-553 (1896). The issue of course was a Louisiana statute regarding separate rail cars based on passengers' race. This was at a time when the then in effect Paternity Act was already a tried and true seventy-six years old. The court concluded:

> So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference

to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in *People v Gallagher*, 93 N.Y. 438, 448: 'This end can neither be accomplished nor promoted

> by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.

Even a layperson today understands the specious, wrongheaded nature of these two majority opinions. They are quoted here at such length to make the obvious point that some things need to be amended or overhauled from time to time, rather than blindly followed. Michigan's Paternity Act presumption of legitimacy is another example of a doctrine or law that needs to be overhauled. It is working just as great an injustice on Michael Barnes, McClain Michael Barnes, and other similarly situated fathers and children as these two old cases did on society at large.

This case must be revisited if for no other reason than its impact on the clearly established rights of McClain Michael Barnes. Appellant's conduct and the opinion of this court have tremendous impact on the rights of McClain Michael Barnes, and yet his interests, arguably the most important, were not and are not yet specifically represented; this alone is an injustice that justifies rehearing and reconsideration. Appellee requests that this court order that a guardian ad litem be appointed to safeguard the rights of McClain Michael Barnes. Appellee does not yet have the authority to look out for his son, and Appellant is clearly not

interested in McClain's rights. Appellee redirects the reader to the Dissenting Opinions for eloquent expressions regarding these issues.

A mother may not contract away the right of an illegitimate child to support from a putative father. "[A]ny release or compromise executed by the mother is invalid to the extent that it purports to affect the rights of the child." *Tuer v Niedoliwka*, 92 Mich App 694, 699 (1979). Would this court become a co-conspirator with McClain's mother to deny him what the courts of Michigan say cannot be denied? Surely, the Michigan Supreme Court should not do something that the Michigan Court of Appeals determined cannot be done by release or compromise. Moreover, the Michigan Court of Appeals recognized years ago that a legislative scheme that grants legitimate children the right to support from their fathers, but denies illegitimate children that same right is clearly an equal protection violation. *Spada v Pauley*, 149 Mich App 196 (1986).

Again, Appellee requests that based on the authority found in MCR 7.316(A)(7) this court appoint a guardian ad litem to protect the rights of McClain Michael Barnes.

Finally, Appellee requests that this case be reheard and reconsidered because of the decision vis-à-vis default judgments. Heretofore, Default Judgments were considered the legal equal of judgments obtained after contest or trial. Clearly, that is not the situation any longer. The foundation for the majority opinion is based on the evisceration of the Default Judgment of Divorce obtained by Appellant's former husband. The courts of this state enter countless default judgments every day. The Plaintiffs who obtain the default judgments and leave the courthouse thinking they have a judicial determination of the allegations contained with the complaint and the findings of fact and conclusions of law contained within the judgment are now vulnerable to attacks by creative parties or attorneys who would question the validity of any would-be findings of fact or conclusions of law contained within the court document. This is truly a Pandora's box about to be opened on the litigants, attorneys, courts of this state, and other nonparties, like Michael Barnes and McClain Barnes, who are impacted by default

judgments.

Wherefore, for the forgoing reasons, including claimed violations of federal equal protection, due process, and substantive due process rights of the United States Constitution as applied to the States through the Fourteenth Amendment to the United States Constitution, Appellee respectfully requests that this court grant his motion and revisit, rehear, and reconsider this case, after ordering the appointment of a guardian ad litem for McClain Michael Barnes.

Dated: August 14, 2006

s/_____
Jeffrey M. Gagie (P49822)
Attorney for Appellee